89-2032

No.: _____

IN THE

Supreme Court of the United States

October Term, 1989

SCOTT KERN, JON LESTER,
and JASON LADONE,
Petitioners,

-against-

THE STATE OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

JOHN L. POLLOK
CHARLES L. WEINTRAUB
Attorneys for Petitioners
260 Madison Avenue
New York, New York 10016
(212) 679-2900

QUESTIONS PRESENTED

1. Whether this Court's decision in *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712 (1986) can constitutionally be expanded to restrict the exercise of peremptory challenges by criminal defendants?

2. Whether "State action' should be defined expansively to include every aspect of the trial process, thereby eliminating peremptory challenges as a meaningful tool for assuring the selection of an unbiased jury?

3. Whether a prospective juror's State constitutional right to participate in the trial process outweighs the accused's Sixth Amendment right to a fair trial?

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Scott Kern, Jon Lester, and Jason Ladone petition for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York.

OPINION BELOW

The opinion of the Court of Appeals (App., *infra,* 1a-27a) is reported at 75 N.Y.2d 638 (1990).

JURISDICTION

The judgment of the Court of Appeals was entered on March 29, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(a).

FEDERAL CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed .... and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment, in pertinent part provides:

> No State shall ... deny to any person within its jurisdiction the equal protection of the laws.

STATE CONSTITUTIONAL PROVISIONS INVOLVED

Section 11 of Article I of the State Constitution provides:

> No person shall be denied the equal protection of the laws of this State or any subdivision thereof. No person shall, because of race, color, creed, or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the State or any agency or subdivision of the State.

STATEMENT OF THE CASE

After a jury trial in the Supreme Court of the State of New York, in the County of Queens, petitioners, Scott Kern and Jon Lester, were convicted of manslaughter in the second degree in violation of Penal Law §125.15, assault in the first degree, in violation of Penal Law §120.10 and conspiracy in the fifth degree, in violation of Penal Law §105.05. Jason Ladone was convicted of manslaughter in the second degree and assault in the first degree. The petitioner Lester was sentenced to terms of imprisonment totalling 10 to 30 years. Kern was sentenced to prison terms totalling 6 to 18 years. And, Ladone received a sentence of 5 to 15 years.

1. On December 19, 1986, four African-Americans, Timothy Grimes, Cedrick Sandiford, Michael Griffith and Curtis Sylvester, were travelling on the Belt Parkway, when Sylvester's car began to overheat. (Tr. 1231-33.) After exiting from the parkway, Sylvester remained with the disabled car, while Grimes, Griffith, and Sandiford began walking through the Howard Beach section of Queens, toward the subway. (Tr. 1241, 1244-45.) While crossing 157th Avenue toward a pizzeria, they encountered three teenagers who stuck their heads out of a car window and yelled "Nigger, get the fuck off the neighborhood." Sandiford responded, "Fuck you, Honkie." (Tr. 4706.) The three African-Americans then entered the pizzeria.

At the same time, a group of teenagers was attending a birthday party in Howard Beach. At this party, according to Robert Riley, an accomplice witness, petitioner Lester approached him and stated, "There was some niggers on the boulevard, let's get up there and kill them." (Tr. 2238.) Shortly thereafter, three cars with

teenagers left the party and drove to the vicinity of the pizzeria. A group of the teenagers, including Riley and the petitioners, confronted Sandiford, Griffith, and Grimes. (Tr. 2237-48.) Petitioner Kern was holding a baseball bat and banging it on the street. Riley ye'led, "Niggers get the fuck out of the neighborhood." (Tr. 2249.) The two groups were three or four feet apart and each formed a semi-circle facing the other. Two of the three African-American men were holding knives in a menacing manner. (Tr. 2250-51, 2237-38.)

Sandiford, who claimed, contrary to the testimony of Riley and Grimes (Tr. 1252-55), that none of the African-Americans had weapons, testified that at that moment, someone hit him across the back with a bat and he began to run across Cross Bay Boulevard behind Griffith. (Tr. 4710.) A group of the teenagers, including the petitioners, chased after the fleeing men. (Tr. 2254-65.)

Griffin, ran across the eastbound Belt Parkway and vaulted the center median where he was struck by an automobile and killed. (Tr. 2298-2300, 3899-3900.) Sandiford was also pursued by the teenagers. He was caught and hit with tree limbs and bats. (Tr. 4711-20.) After a while, the beating stopped and Sandiford's pursuers left in a number of cars which had arrived on the scene. (Tr. 4721.) Sandiford sustained swelling and bruises to his back and left forearm, a small laceration of the scalp and traumatic iritis of the right eye. (Tr. 5481, 5491, 5510-12, 5515.)

2. This incident at Howard Beach triggered a storm of racial protests and confrontations which continued throughout the pretrial and trial phases of the

case. Petitions were mounted to secure the appointment of a Special Prosecutor and to demand the conviction of the petitioners. Demonstrations and outbursts reached the courthouse steps and, indeed, violated the trial proceedings themselves. (Tr. 3402, 4813-20.) Throughout, media coverage was intense. By the time jury selection commenced, in the public's eye, Howard Beach became synonymous with racial violence. This fact did not escape the prosecutors or the defense. Throughout the jury selection process, the prosecutors attempted to exclude white and Italian-American jurors. Their goal was to exclude jurors who might be less inclined to convict. Thus, of the 20 peremptory challenges exercised by the prosecution, 19 were directed against non-blacks, (Tr. (*Voir Dire*) 1536-37, 1722), and virtually every Italian-American was challenged, (Tr. (V) 439-44, 445-47, 697, 1259, 1262-63, 1536, 1709.) The prosecution attempted to seat as many African-American jurors as possible in the belief that such jurors would be more inclined to convict the defendants. Thus, the trial court concluded, "It has not escaped me that the prosecutor applies tactics so that more black jurors may come before the court for peremptory challenge." (Tr. (V) 1747.)

The trial court also concluded that the defense had used peremptory challenges to systematically exclude African-Americans from the jury. Therefore, the defense, but not the prosecution, was required to articulate case-specific, race-neutral reasons to justify peremptory challenges of African-American jurors. (Tr. (V) 1015, *et seq.*)

3. The New York Court of Appeals affirmed petitioners' convictions. (App., *infra,* 1a-27a.) First the

court held that while peremptory challenges play an important role in criminal trials, they are not of constitution dimension. *(Id.* at 10a) The Court then held that the civil rights clause of the State Constitution, Section 11 of Article I, prohibits defense counsel's exercise of peremptory challenges based upon a juror's race. The court held that the right of a juror to serve on a jury is a civil right within the purview of Art. I, Section 11, and as "State action" is not a requirement of the civil rights clause, it prohibits challenges based upon race whether exercised by the prosecution or the defense. (*Id.* at 13a-17a.)

Expanding this Court's holding in *Batson v. Kentucky,* 479 U.S. 79, 106 S.Ct. 1712 (1986), the Court of Appeals also held that the equal protection clause of the State Constitution, also found in Art. I, Section 11, prohibits the exercise of discriminatory peremptory challenges by the defense. (App., *infra* at 18a-25a.) As the State equal protection clause is co-extensive with its Federal counterpart, "State action" is a necessary component. The court held that State action was established because "the State is inevitably and inextricably involved in the process of excluding jurors as a result of a defendant's peremptory challenges." (*Id.* at 23a.)

REASONS FOR GRANTING THE PETITION

This case presents questions of fundamental importance to the administration of justice in both state and federal courts. These fundamental issues affect civil as well as criminal litigations and strike at the heart of the constitutional right to trial by jury. They affect the limits of governmental power as defined by the "State

action" requirement and confront the fundamental tension inherent in subjugating a criminal defendant's Federal constitutional rights to the rights of prospective jurors secured by the State Constitution. In sum, this is an appropriate case to review because it presents the following issues striking at the foundation of our system of justice: 1) Is the exercise of peremptory challenges by criminal defendants and their counsel "State action" subjecting them to the strictures of the Federal and New York State equal protection clauses? -- a question specifically and explicitly left open in *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712 (1986). 2) Where should the balance be struck between rights protected by the equal protection clauses and the New York State civil rights clause on the one hand and the criminal defendant's right to a fair jury, on the other? 3) Will the extension of *Batson* to criminal defendants (and as a necessary corollary civil litigants) sound the death knell for the peremptory challenge, dealing a crippling blow to the accused's right to a fair trial?

1. In *Batson,* the Court held that a criminal defendant is denied equal protection when the prosecution exercises peremptory challenges to systematically exclude members of his race from the jury. As in prior decisions, the *Batson* holding was rooted in the fundamental concept that the Fourteenth Amendment only prohibits governmental discrimination, *see, e.g. Swain v. Alabama,* 380 U.S. 202, 85 S.Ct. 824 (1965); *Staunder v. West Virginia,* 10 Otto 303, 100 U.S. 303 (1880), for the amendment "erects no shield against merely private conduct, however, discriminatory or wrongful." *Shelly v. Kramer,* 334 U.S. 1, 13. 68 S.Ct. 836, 842 (1948). Thus, the *Batson* Court specifically declined to express any view concerning whether the Constitution

limits the exercise of peremptory challenges by defense counsel. *Batson,* 106 S.Ct. at 1718 n.12.

In the present case, the New York Court of Appeals incorrectly focused its "State action" inquiry on the trial process rather than the role of defense counsel in criminal proceeding. (App., *infra,* 21a-25a.) This Court has explicitly held that a criminal defense counsel acting on behalf of his client in a criminal proceeding is not a State actor subject to constitutional constraints. *Polk County v. Dodson,* 454 U.S. 312, 102 S.Ct. 445 (1981). A criminal lawyer is not a State actor because his function in a criminal trial is to act in opposition to the State:

> Within the context of our legal system, the duties of a defense lawyer are those of a personal counselor and advocate. It is often said that lawyers are "officers of the court" but the Courts of Appeals are agreed that a lawyer representing a client is not, by virtue of being an officer of the court, a state actor "under color of state law" within the meaning of Section 1983. In our system *a defense lawyer characteristically opposes the designated representatives of the State. The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness. But it posits that a defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing "the undivided interests of his client." This is essentially a private function, traditionally filled by retained counsel, for which state office and authority are not needed.*

Id. at 318-19, 102 S.Ct. at 450 (emphasis added) (footnotes omitted).

The exercise of peremptory challenges is no exception to this rule. This Court has held that under-representation of blacks on petit juries was in itself insufficient to permit an inference of systematic governmental discrimination precisely because the exercise of peremptory challenges by criminal defense counsel is not "State action." *Swain v. Alabama*, 85 S.Ct. at 839. *See also, Roman v. Abrams,* 608 F.Supp. 629, 633 (S.D.N.Y. 1985), *aff'd.,* 822 F.2d 214 (2d Cir. 1987).

The Court of Appeals made no reference to this aspect of *Swain*. It dismissed *Polk County* as purportedly limited to a narrow holding that solely because a public defender is paid by the State, does not make him a State actor. (App., *infra* at 21a-22a.) The court, instead, relying principally upon *Shelly v. Kramer,* 334 U.S. 1, 68 S.Ct. 836 (1948) and *Tulsa Professional Collection Services v. Pope,* ___ U.S. ___, 108 S.Ct. 1340 (1988), emphasized the judicial nature of the proceedings, and, *sub silencio,* substituted the trial judge as the "State actor."[1] However, the trial judge's ministerial function in informing a prospective juror that he has been excused, is clearly insufficient to cast him as the State actor in this drama. *See Edmonson v. Leesville Concrete Co., Inc.,* 895 F.2d at 221-22. And, without a "State actor," there is no "State action," *Lugar v. Edmondson Oil Co.,* 457

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1. In applying *Batson* to civil litigants, a panel of the Eleventh Circuit has also held that the judge is the State actor. *Fludd v. Dyke*, 863 F.2d 822, *cert. denied sub. nom. Tiller v. Fludd,* 110 S.Ct 201 (1989). The Fifth Circuit, sitting *en banc*, has rejected this notion and held that the exercise of peremptory challenges in civil litigation is not "State action." *See Edmonson v. Leesville Concrete Co., Inc.,* 895 F.2d 218 (5th Cir. 1990) (*en banc*). The Eight Circuit has expressed "strong doubts" that *Batson* applies to civil litigation. *See Swapshire v. Back,* 865 F.2d 948, 953 (8th Cir. 1989); *Wilson v. Cross,* 845 F.2d 163, 164 (8th Cir. 1988).

U.S. 922, 939, 102 S.Ct. 2744, 2754 (1982). Beyond these basic defects, the Court of Appeals lost sight of the unique position of a criminal defendant in the trial process. He is distinct from a civil litigant or creditor who voluntarily enlists the aid of State procedures and courts to enforce some right. A criminal defendant is not a voluntary participant in the trial. He is forced to participate and he alone stands to lose his liberty and, at times, his life.

Further, the court's "State action" holding reaches far beyond the exercise of peremptory challenges by criminal defense counsel. By focusing upon the trial process and holding that the most ministerial of acts by the trial judge is sufficient to constitute State action "it (necessarily) follows that every aspect of every trial, state and federal, is constitutionalized...." *Edmonson v. Leesville Concrete Co., Inc.,* 895 F.2d at 222. This "quantum procedure leap" has far-reaching implications. In short, every act of a private attorney to further the private interests of his client will be subject to the strictures of the federal Constitution. This result is squarely at odds with this Court's specific holding in *Polk County v. Dodson, supra,* that the actions of criminal defense counsel, in opposition to the State, do not amount to State action.

It is essential that this Court correct this expansive "State action" holding by the Court of Appeals in order to preserve private autonomy, which lies at the foundation of our constitutional democracy.

2. Whether a criminal defendant can assert an equal protection violation when the prosecutor has challenged members of a group other than his own, is

not certain.[2] Criminal defense counsel cannot, however, be subjected to the strictures of *Batson*, unless the prosecutor can assert the rights of jurors from every cognizable group. If the prosecutor may raise a violation of any juror's equal protection rights, logic and due process require that defense counsel can do no less. Once this premise is accepted, then "intentionally using peremptory challenges to exclude any identifiable group should be impermissible -- which would ... 'likely require the elimination of peremptory challenges'." *Holland*, at 809, *quoting Lockhart v. McCree*, 476 U.S. 162, 178 (1986).[3]

This Court has repeatedly emphasized the central role of peremptory challenges in the selection of fair juries. In *Pointer v. United States*, 151 U.S. 396, 408 (1894), the Court held that the exercise of peremptory challenges is "one of the most important of the rights secured to the accused ... [and] any system for the empaneling of a jury that prevents the full, unrestricted exercise by the accused of that right must be condemned." The peremptory challenge can be traced to the dawn of the common law and since that time it has occupied an important position in guaranteeing the right to trial by an impartial jury, both in England and the United States. Thus, "[t]he constitutional phrase 'impartial jury' must surely take its content from this

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2. Justices Kennedy, Marshall, Brennan, Blackmun and Stevens have expressed the view that he can. *Holland v. Illinois*, 110 S.Ct. 803, 811, 812, 820 (1990) (Kennedy, J., concurring) (Marshall, J., dissenting) (Stevens, J., dissenting).

3. While *Holland* and *Lockhart* involved Sixth Amendment claims, the probable elimination of peremptory challenges is the same whether every identifiable group is protected by the Sixth or Fourteenth Amendments.

unbroken tradition.' *Holland,* 110 S.Ct. at 808 (footnote omitted). The Court, in *Holland,* went on to hold that:

> .... that device occupies "an important position in our trial procedures," *Batson,* 476 U.S. at 98, 106 S.Ct. at 1724, and has indeed been considered "a necessary part of trial by jury", *Swain v. Alabama,* 380 U.S. at 219, 85 S.Ct. at 835. Peremptory challenges by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of "eliminat[ing] extremes of partiality on both sides," *ibid.,* thereby, "assuring the selection of a qualified and unbiased jury," *Batson, supra,* 476 U.S. at 91, 106 S.Ct. at 1720 (emphasis added). *Id.* at 809.

Indeed, the significance of this device to the jury selection process is such that "[o]ne could plausibly argue that the requirement of an 'impartial jury' impliedly *compels* peremptory challenges ...." *Id.* at 808 (emphasis in original).

The holding of the New York Court of Appeals sounds the death knell for peremptory challenges. At least, to the extend they insure the accused's right to a fair and impartial jury, the peremptory challenge should be preserved in meaningful form. Therefore, this Court should review this case to set limits on the extent to which the peremptory challenge system may be damaged by the Court of Appeal's expansive reading of *Batson.*

3. Whether resting on the equal protection clause or the civil rights clause, the Court of Appeal's decision failed to consider the impact that limiting peremptory

challenges would have on the defendant's Constitutional right to a fair jury. In this case, the interests of the petitioners in securing a fair trial outweighed the interest of prospective jurors to be seated on the jury. Therefore, the Court of Appeals erred in applying *Batson* to the defense. To the extent the State's civil rights and equal protection clauses as applied, violated the defendants' Federal Constitutional rights, they should be declared unconstitutional. Therefore, this Court should review the decision in order to strike the proper balance between the state constitutional right of prospective jurors and the petitioners' Federal constitutional right to a fair trial.

The Bill of Rights was designed principally to counterbalance the awesome power of the State. While that imbalance cannot be completely corrected, the framers of the Constitution attempted to offset the States' advantage by created rights for the benefit of the accused. *Wardius v. Oregan,* 412 U.S. 470, 480, 93 S.Ct. 2208, 2215 (1973) (Douglas, J., concurring). The right to trial by jury was specifically created for the protection of criminal defendants:

> The guarantee of jury trial in the Federal and State Constitutions reflects a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.
>
> * * * Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the com-

compliant, biased or eccentric judge. *Duncan v. Louisiana,* 391 U.S. 145, 155-56, 88 S.Ct. 1444, 1451 (1968).

The right to trial by jury has been recognized as a fundamental right, that is, a "fundamental principal of liberty and justice which lies at the base of all our civil and political institutions." *Id.* at 148, 88 S.Ct. at 1447, *quoting Powell v. Alabama,* 287 U.S. 45, 67, 53 S.Ct. 63 (1932). And, while the goal of the Sixth Amendment is jury impartiality for both contestants, "the constitutional guarantee runs only to the individual and not to the State ...." *Holland v. Illinois,* 110 S.Ct. at 809. As the peremptory challenge is essential to the process of selecting a fair jury, the State cannot invoke *Batson* or the State Constitution to limit a defendant's exercise of peremptory challenges unless the prospective juror's equal protection right outweighs the defendant's Sixth Amendment right to a fair jury.

In assessing the juror's equal protection right it is important to determine whether the challenge is based upon the demeaning and patently unacceptable belief that members of any race are inferior or rather upon the logical belief in a racially charged atmosphere, that a juror of the same group-affiliation as the victim "may be inclined - even if only ever so slightly - to favor one of (his) own." *Edmonson v. Leesville Concrete Co.,* 895 F.2d at 224. In the latter case, be it a civil or criminal proceeding, being excused from the jury is not demeaning because it implies no racial inferiority. Rather, it rests on the sound principal that members of any cohesive group may ever so slightly tend to associate with and more easily empathize with members of their own group.

In the present case, both the prosecution and defense recognized that white juror might tend to favor the defense and African-American juror might tend to favor the prosecution. In such circumstances, challenges to members of these groups are not demeaning and the defendant's right to a fair jury clearly outweighs any right of the potential juror to be selected to serve in a particular case. Certainly, in view of this Court's decisions in *Batson* and *Holland* and the Fifth Circuit's *en banc* decision in *Edmonson,* it is essential that clear and uniform rules for balancing the interests of the accused and those of potential juror's be established. Therefore, this Court should grant certiorari to strike the appropriate balance in favor of the defendant's constitutional right to a fair trial and to make clear that State constitutional provisions, to the extent they have been interpreted as overriding this balance, are unconstitutional.

CONCLUSION

Based upon the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN L. POLLOK
CHARLES L. WEINTRAUB
Attorneys for the Petitioners

June, 1990

APPENDICES

Appendix A
Opinion of Court of Appeals, State of New York

COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE & C.,

Respondent,

v.

SCOTT KERN, JASON LADONE and
JON LESTER,

Appellants.

OPINION No. 43

Charles L. Weintraub, Susan C. Wolfe, John L. Pollok, arguing, plus Edward Gasthalter, Michael H. Gold, NY City, for Appellants.

Arthur G. Weinstein, Helman R. Brook, Matthew S. Greenberg, NY City, for Respondent.

Arnold S. Cohen, NY Legal Aid, Amicus Curiae.

ALEXANDER, J.:

On this appeal, defendants assert a right, through the mechanism of the peremptory challenge, to exclude persons of a particular race from service on a criminal jury. We hold today that such racial discrimination has no place in our courtrooms and that such conduct by defense counsel is prohibited by both the civil rights clause and the equal protection clause of our State Constitution. Accordingly, we affirm the order of the Appellate Division upholding defendants' convictions.

Appendix A
Opinion of Court of Appeals, State of New York

I

Defendants were convicted, after a highly publicized trial, of manslaughter, assault and conspiracy charges arising out of their participation in an attack by a group of white teenagers upon three black men in the community of Howard Beach in Queens. This so-called "Howard Beach incident" occurred during the early morning hours of December 20, 1986, after the three victims, Michael Griffith, Cedric Sandiford and Timothy Grimes left their disabled car on the nearby Cross-Bay Boulevard and walked into the Howard Beach neighborhood to seek assistance.

At the same time that Griffith, Sandiford and Grimes left their car, a birthday party was being held in Howard Beach and was attended by approximately 30 teenagers, including defendants Kern, Lester, and Ladone, their co-defendant Michael Pirone[1] and the accomplice who testified against them, Robert Riley. At approximately 12:20, Kern's girlfriend, Claudia Calogero, left the party and was driven home by Salvatore Disimone, accompanied by Lester and a fourth youth. As Disimone turned the corner from Cross Bay Boulevard onto 157th Avenue, Griffith, Grimes and Sandiford started to cross the street, heading towards the New Park Pizzeria. Calogero testified that three black men darted in front of the car, forcing Disimone to stop suddenly. An argument ensued between the pedestrians and the occupants of the car. According to

1. Pirone, who was tried jointly with the other defendants, was acquitted of all the charges against him.

Appendix A
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Calogero, Sandiford stuck his head into the car window and stared at the teenagers. According to Sandiford's testimony, however, the occupants of the car stuck their heads out of the window and yelled "Niggers, get [out of] the neighborhood". Following that confrontation, the three men crossed the street and entered the Pizzeria while the youths continued on their way. After driving Calogero home, Disimone, Lester and the other youth returned to the party.

Robert Riley was sitting on the steps outside the house where the party was being held when Disimone, Lester and the other youth arrived. Lester shouted "There were some niggers on the boulevard, lets go up there and kill them". A few minutes later, a number of youths, including Kern, Lester, Ladone and Pirone, left the party to track down the three black men. Disimone led the caravan of cars from the party to the New Park Pizzeria in his car with Lester and Ladone. Riley followed in his own car with three male teenagers and Laura Castagna, whom Riley intended to escort home. John Sagese followed the group in his car. Although Riley did not know in which car Kern and Pirone traveled, he testified that he observed the two when the group eventually arrived at the Pizzeria.

Meanwhile, at approximately 12:45 a.m., Grimes, Sandiford and Griffith left the New Park Pizzeria. At that point, the cars containing the teenagers pulled into the parking lot and the youths, with the exception of Laura Castagna, emerged from the cars. The group, wielding bats and sticks, confronted Griffith, Grimes and Sandiford and yelled at them to get out of the neighborhood. Riley testified that Kern was banging a

baseball bat on the ground as the teenagers formed a semi-circle around the three men, who, according to Riley, were each holding a knife. According to Grimes, several of the youths were carrying bats and sticks and one youth held "something that looked like an iron pipe". Sandiford testified that he did not have a weapon and that he did not observe whether Griffith or Grimes displayed any weapons. Grimes testified that he pulled out a knife and held it in front of him as the youths approached. At that point, Sandiford was struck in the back by a bat. Although Riley never saw Kern swing the bat he had been holding, he did testify that after Sandiford was struck, Riley grabbed the bat from Kern because he (Riley) could swing it "harder". As the three men fled across Cross Bay Boulevard, Riley, Kern, Ladone, Lester, Pirone and several other youths gave chase.

Griffith, Grimes and Sandiford ran in different directions. Grimes headed north on Cross Bay Boulevard and managed to escape his attackers. Sandiford was struck several times with bats and tree limbs as his assailants chanted "Niggers, get * * * out of the neighborhood". Sandiford was able to break away from the youths and was eventually joined by Griffith as they ran down an alleyway behind several stores parallel to Cross Bay Boulevard. The two men were followed by Kern, Ladone, Lester, Riley, Pirone and two other youths. The alleyway ended at a three-foot-high barricade where it intersected with 156th Avenue. Both Sandiford and Griffith jumped over the barricade and made a left turn onto 156th Avenue. The group of teenagers followed approximately 30 feet behind.

jumped the barricade and continued the chase.

At that time, Saggese pulled up in the westbound lane on 156th Avenue; and, after clearing the barricade, Riley got into the backseat. The car followed closely behind the youths on foot, who turned right on 90th Street, following Griffith. At the end of 90th Street, a three-foot-high guardrail separated that street from the Belt Parkway, a six lane highway which runs east and west. Shore Parkway, a service road for the Belt Parkway which also runs east and west, partially intersects 90th Street at the guardrail and leads to Cross Bay Boulevard. The Saggese car, which had pulled ahead of the youths on foot, stopped three quarters of the way down 90th Street. Lester ran to the car, grabbed a bat from Riley, and he, Riley, Kern and Ladone ran toward the end of 90th Street after Griffith. Griffith jumped over the guardrail and ran onto the Belt Parkway. When the youths reached the guardrail, Riley observed Griffith run across the three eastbound lanes of the highway, jump the center median and enter the westbound lanes where he was struck by a car driven by Dominic Blum. Griffith was killed in the accident; his body was thrown a distance of approximately 75 to 125 feet and Blum left the scene without realizing that he had hit a person. He later returned to the scene of the accident and spoke to the police.

After the youths observed Griffith being struck by a car, Lester, Kern and Ladone ran back toward 156th Avenue where they met up with two other youths. Riley, Pirone, Saggese and another youth returned in Saggese's car to the Pizzeria, where they picked up Castagna and headed toward 156th Avenue.

Appendix A
Opinion of Court of Appeals, State of New York

Sandiford, who had managed to temporarily escape his assailants, was walking west on 156th Avenue when he was attacked from behind by the group of teenagers who beat him with bats and tree limbs. Sandiford testified that he managed to grab the bat being wielded by Lester as he pleaded with Lester not to kill him. At that point, a car pulled up and, as its occupants approached, Sandiford released the bat which Lester then swung at him, striking him in the head and causing blood to run down the back of his head. He further testified that he "fe[lt] like [his] brain * * * busted apart".

Sandiford broke away from his attackers, who continued to chase him. The chase ended when Sandiford tried to climb a chainlink fence which ran parallel to the Belt Parkway. The youths pulled Sandiford down from the fence, kicking and beating him with bats and tree limbs. Sandiford cried for help to Theresa Fisher, who was standing in the doorway of a house across the street. In response, Fisher called the police. A tape recording of her 911 call was admitted into evidence at the trial. The beating of Sandiford continued and the final attack was witnessed by George and Marie Toscano, who also called the police.

After his assailants left him, Sandiford was picked up by a police car on the Belt Parkway and driven to the site where Griffith's body was located, where he identified the body. He was later taken to the hospital and treated for his injuries.

Thereafter, defendants were arrested and indicted and *Huntley* hearings were conducted on the admissibility of their statements to law enforcement offi-

cials. The hearing on Lester's statements established that he was arrested and brought to the 106th precinct on the morning of December 22, 1986. When Lester requested and was given a newspaper by a police officer, Lester read the front-page headline about the Howard Beach incident and declared "[t]his isn't what happened. It's not even close." Lester was then advised, for the first time, of his *Miranda* rights and gave a statement detailing his participation in the crime. Questioning ceased at 1:50 p.m., when Lester was advised that his attorney had telephoned. Shortly before 2 p.m., Lester was seated uncuffed in a room adjoining the squadroom. Lester motion to Assistant District Attorney Wolk, who was standing in the squad room. Wolk recounted his conversation with Lester as follows: "[Lester] said to me, '[a]re you an attorney?' I said '[j]ust so you know, I'm an Assistant District Attorney'. After I said that [Lester] motioned me towards him with a finger. I walked a few steps towards him and I stood next to him. [Lester] said * * * 'I know people are giving me up. I won't give anybody up. I was taught you don't rat on your friends, but I'll tell you what I did.' I stood there and he continued * * * 'I chased the taller black guy with a baseball bat and I struck him with the baseball bat, but I didn't chase the other guy.' Then he repeated again, 'I won't tell you what anybody else did. I was taught you don't rat on your friends'". Following this conversation, Wolk walked away from Lester. Supreme Court ruled admissible Lester's declaration upon viewing the newspaper and his statement to ADA Wolk. The court also ruled

admissible certain statements made by defendants Kern and Ladone.

After these rulings, the trial commenced. On the first day of jury selection, defense counsel successfully challenged for cause one of the four black jurors on the panel. Defense counsel unsuccessfully challenged for cause two of the remaining three black jurors, and subsequently peremptorily challenged all three black jurors. Before exercising these peremptories, defense counsel applied for eight additional peremptory challenges because, in their view, the black jurors did not "want to be excused. They're coming in here volunteering", whereas white jurors "who aren't anxious to serve are using all kinds of excuses to get off any duty". Supreme Court rejected defense counsel's argument that the venire did not represent a fair cross-section of the community and denied the application. After the defense exercised its peremptory challenges, the prosecution argued that it had established a prima facie case of discrimination and moved to require defense counsel to provide racially neutral explanations for the challenges to black prospective jurors. Supreme Court denied the application as premature.

The prosecution renewed its application on the third day of jury selection and the court reserved decision. At the end of voir dire that day, defense counsel challenged for cause six black jurors on the panel. One challenge was granted on consent and the remainder were denied. The next day, Supreme Court ruled that defense counsel could not constitutionally exercise peremptory challenges in a racially discriminatory manner and held that the procedures

articulated in *Batson v Kentucky* (476 US 79) were therefore applicable to defense counsel. As a remedy, the court ordered that its ruling be applied prospectively -- requiring defense counsel to provide neutral explanations for any future peremptory challenges of black jurors.

When jury selection resumed, the defense peremptorily challenged seven black jurors. One juror was excused without explanation and the defense proffered racially-neutral explanations for the challenges to the remaining six. The court accepted the explanations as to three of the jurors, and rejected the explanations offered as to the other three jurors. Two of those jurors, however, were subsequently excused for unrelated reasons and only one juror was seated over defense objection. That juror, however, was also excused when her son became ill prior to the completion of the trial. The first alternate, who had been accepted by both the prosecution and the defense, took her place and deliberated with the other jurors, all of whom the defense had indicated were satisfactory.

Defendants Kern and Lester were convicted of second degree manslaughter with regard to Griffith's death, first degree assault with regard to the attack on Sandiford at 156th Avenue, and fifth degree conspiracy. Ladone was convicted of second degree manslaughter and first degree assault. The Appellate Division affirmed their convictions in all respects and defendants appeal by leave of an Associate Judge of this Court.

Defendants' primary contention on this appeal is that Supreme Court erred in restricting their exercise of peremptory challenges. They argue that neither the

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State nor the Federal Constitutions prohibit a criminal defendant from exercising racially discriminatory peremptory challenges. In addition, they argue that the evidence was legally insufficient to sustain their convictions and that Supreme Court committed reversible error by admitting certain of their statements at the trial. We find the arguments unpersuasive and affirm the order of the Appellate Division.

II

Although peremptory challenges have long played an important role in the conduct of criminal trials (*Holland v Illinois,* ___ US ___ ; SCt ___; 58 USLW 4162; *Lewis v United States,* 146 US 370, 380; *Pointer v United States,* 151 US 396, 408-409; *see also People v Thompson,* 79 AD2d 87; *see generally,* Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial,* 102 Harv L Rev 808), they are not of constitutional dimension (*Holland v Illinois, supra*; *Batson v Kentucky,* 476 US at 91, *supra; Stilson v. United States,* 250 US 583, 586; *Hayes v Missouri,* 120 US 68, 71-72; *People v Lobel,* 298 NY 243, 257; *People v Doran,* 246 NY 409, 426-427; *Walter v People,* 32 NY 147, 160). In New York, it was not until 1828 that defendants were accorded the right to exercise premptory challenges (2 Rev Stat [1829], part IV, ch II, tit V, Sec. 9; *see People v Thompson,* 79 AD2d at 98, *supra*). Today, the right derives from CPL 270.25, which defines a peremptory challenge as "an objection to a prospective juror for which no reason need be assigned" and sets the number of peremptory challenges for both

the Prosecution and the defense in accordance with the seriousness of the crimes charged.

The prosecution's exercise of peremptory challenges, however, is not completely unfettered. The Supreme Court has restricted the prosecution's use of peremptories in accordance with the mandates of the Equal Protection Clause, holding that the Fourteenth Amendment prohibits the prosecution from exercising peremptory challenges so as to purposefully exclude persons of a particular race from service on the petit jury *(Batson v Kentucky,* 476 US 79; *Swain v Alabama,* 380 US 202; *Strauder v West Virginia,* 100 US 303). Of course, at least to the extent that our State equal protection provision is co-extensive with the federal provision *(Matter of Esler v Walters,* 56 NY2d 306, 314), the State Constitution prohibits such discrimination as well (*see People v. Hernandez,* ___ NY2d ___ [decided February 22, 1990]; *cf. People v McCray,* 57 NY2d 542, 550, *cert. denied* 461 US 961 [following *Swain*]). Rejecting the evidentiary standard articulated in *Swain v Alabama (supra), Batson* established the present procedure for making out an equal protection claim in the selection of the petit jury. First, the defendant is required to establish a prima facie case of discrimination by demonstrating that (1) he or she is a member of a cognizable racial group, (2) the prosecution has exercised peremptory challenges to exclude members of that group from the petit jury, and (3) "these facts and any other relevant circumstances raise an inference" of purposeful discrimination *(Batson v Kentucky,* 476 US at 96, *supra; see also People v Jenkins,* ___ NY2d ___ [Case No. 38] [decided today]; *People v Scott,* 70 NY2d 420).

Once the defendant has made such a showing, the burden shifts to the prosecution to articulate non-pretextual, racially neutral reasons for the suspect peremptory challenges (*Batson v Kentucky*, 476 US at 97, *supra*).

The question we confront today is whether the procedures articulated in *Batson* may be applied to limit the exercise of peremptory challenges by the defense. Since defense peremptory challenges are not so limited by statute, the question, more precisely, is whether purposeful racial discrimination by defendants and their counsel, in the form of exercising peremptory challenges to exclude a particular racial group from the petit jury, is constitutionally permissible. For the reasons that follow, we agree with the courts below that such purposeful racial discrimination is prohibited by both the civil rights clause and the equal protection clause of Article I Section 11 of our State Constitution.

A

As a threshold matter, we reject the people's contention that defendants' challenge to the restrictions on their peremptory challenges is moot because the one juror seated over their objection was excused prior to deliberations. Supreme Court's ruling, after six jurors had been selected, that the *Batson* procedures would be applied to the defense, affected the selection of all the remaining jurors. Once the People established a *prima facie* case of discrimination, defense counsel were required to offer non-pretextual, racially neutral explanations for their peremptory challenges to black

prospective jurors. The legitimacy of the reasons proffered, defense counsel knew, might be evaluated in light of their conduct throughout the jury selection, including their questioning of and challenges to white prospective jurors *(see e.g., People v Bridget,* 139 AD2d 587, 588; *People v Gregory ZZ,* 134 AD2d 814, 816 *lv denied,* 71 NY2d 905; *State v Tolliver,* 750 SW2d 624 [Mo App 1988]; *State v Antwine,* 743 SW2d 51 [Mo 1987]; *Slappy v State,* 503 So2d 350 [Fla App, 3d Dist 1987], *cert. denied* ___ US ___, 108 SCt 2873). Consequently, the defense questioning of these white prospective jurors, some of whom did serve on the jury, may have been inhibited as well.

B

Because this case implicates fundamental policies of the State of New York, we turn to the question of whether the State Constitution permits the purposeful racial discrimination practiced by the defense here. We conclude that it does not.

Section 11 of Article I of the State Constitution provides:

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state.

While the first sentence of this section is an equal protection provision which, like the Federal equal

protection right, is addressed to "State action" *(Under 21, Catholic Home Bureau for Dependent Children v City of New York,* 65 NY2d 344, 360, n 6; *Matter of Esler v Walters,* 56 NY2d 306, 314; *Dorsey v Stuyvesant Town Corp,* 299 NY 512, 530-531), the civil rights clause contained in the second sentence prohibits private as well as state discrimination as to "civil rights" *(Dorsey v Stuyvesant Town Corp,* 299 NY at 531, *supra*). The term "civil rights" was understood by the delegates at the 1938 Constitutional Convention to mean "those rights which appertain to a person by virtue of his citizenship in a state or community" (4 Rev. Record of N.Y. State Constitutional Convention, 1938, p. 2626 [statement of Delegate H.E. Lewis]). The civil rights clause is not self-executing, however, and prohibits discrimination only as to civil rights which are "elsewhere declared" by Constitution, statute, or common law (id. at 2626-2627; *see also Dorsey v Stuyvesant Town Corp,* 299 NY at 531, *supra*).

Defendants argue that this civil rights clause is inapplicable in this instance because no statute prohibits the exercise of racially discriminatory peremptory challenges. This argument, however, reduces our constitutional civil rights clause to a mere redundancy; in defendants' view, the clause would operate to prohibit private discrimination only where such discrimination was already expressly prohibited by statute. We do not read the constitutional provision so narrowly.

In *Dorsey,* we held that the right to be free from racial discrimination in the acquisition of housing was not a "civil right" "elsewhere declared" because, at that time, no statute recognized the right to the acquisition

of an interest in real property to be a civil right, the delegates at the Constitutional Convention in 1938 had expressly rejected the designation of such an interest as a civil right, and the Legislature had recently declined to amend the Civil Rights Law to define the opportunity to purchase and lease real property to be a civil right *(Dorsey v Stuyvesant Town Corp,* 299 NY at 531, *supra*).

Jury service, by contrast, is a civil right established by Constitution and statute. First, jury service is a "privilege[] of citizenship" secured to the citizens of this State by Article I Section 1 of the State Constitution. Service on the jury has long been recognized to be both a privilege and duty of citizenship *(Theil v Southern Pacific Co,* 328 US 217, 224; *Strauder v West Virginia,* 100 US at 308, *supra; see also People v Briggins,* 67 AD2d 1004, 1006 [Titone, J, dissenting]; *revd* 50 NY2d 302; *People v Gary M.,* 138 Misc2d 1081, 1095; *People v Davis,* 142 Misc2d 881, 889). Indeed, it is because jury service is a means of participation in government that, in the words of Mr. Justice Black, "it is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a truly representative government" *(Smith v Texas,* 311 US 128, 130).

These concerns have been articulated in the context of ensuring that a criminal defendant is tried by a jury drawn from a venire that is representative of a

fair cross-section of the community *(see Taylor v Louisiana,* 419 US 522) and that the grand jury, the venire and the petit jury afford him the equal protection of the laws *(Smith v Texas, supra; Strauder v West Virginia, supra; Batson v Kentucky, supra).* Nevertheless, these cases illustrate that jury service is a means of participation in government which can only be considered a privilege of citizenship. Racial discrimination in the selection of juries harms the excluded juror by denying this opportunity to participate in the administration of justice, and it harms society by impairing the integrity of the criminal trial process *(Batson v Kentucky,* 476 US at 87-88; *McCray v Abrams,* 461 US 961, 968 [Marshall, J., dissenting from denial of certiorari]; *Ballard v United States,* 329 US 187, 195).

We reject defendants' contention that these fundamental concerns are relevant only to prohibiting racial discrimination in the selection of the venire and therefore that the privilege of citizenship secured by Article I Section 11 extends only to qualification for jury service on the venire. A citizen's privilege to be free of racial discrimination in the qualification for jury service is hardly a privilege if that individual may nevertheless be kept from service on the petit jury solely because of race. While it is true that no citizen has a right to sit on any particular petit jury, the Legislature has declared as the policy of this State that "all eligible citizens shall have the opportunity [and obligation] to serve on grand and petit juries in this state" (Judiciary Law § 500). We hold today that this opportunity for service on a petit jury is a privilege of citizenship which may not be denied our citizens solely on the basis of their race.

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Second, the Legislature has expressly declared service on the petit jury to be a civil right, providing in Civil Rights Law § 13 that

> [n]o citizen of the state possessing all other qualifications which are or may be required or prescribed by law, shall be disqualified to serve as a * * * petit juror in any court of this state on account of race.

We are unpersuaded by defendants' contention that this statute is directed only at the actions of the jury commissioner and does not serve to limit the peremptories accorded to the defense in CPL 270.25. The statute leaves no doubt that service on the petit jury is a civil right in this State, and, this being so, it is the civil rights clause of Article I Section 11 of the Constitution which limits the defense exercise of its peremptories, notwithstanding the language of CPL 270.25.

Accordingly, we conclude that purposeful racial discrimination in the exercise of peremptory challenges, whether exercised by the prosecution or the defense, is prohibited by the civil rights clause of Article I Section 11 of the State Constitution.[2]

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2. We note that our decision is in accord with the decisions of several other State courts which, interpreting their own constitutions, have held that defendants, as well as the prosecution, are prohibited from exercising racially discriminatory peremptory challenges *(see Commonwealth v Soares,* 377 Mass 461, 387 NE2d 499, *cert. denied,* 444 US 881; *People v Wheeler,* 22 Cal3d 258, 583 P2d 748; *State v Neil,* 457 So2d 481 [Fla]).

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C

The People further argue that the exercise of racially discriminatory peremptory challenges by the defense violates Article I Section 11 because such challenges deny the excused jurors the equal protection of the laws. In previous cases we have held that our State equal protection provision, like the Federal equal protection right, is directed at discrimination attributed to the government and requires a showing of "State action" *(Under 21 Catholic Home Bureau for Dependent Children v City of New York,* 65 NY2d at 360, n.6, *supra; Matter of Esler v Walters,* 56 NY2d at 314, *supra; Dorsey v Stuyvesant Town Corp,* 299 NY at 530-531).

Our analysis begins with the Supreme Court's decision in *Batson v Kentucky (supra).* In *Batson,* the Court expressly declined to decide whether the Equal Protection Clause restricted the exercise of peremptory challenges by defense counsel *as well as the prosecution (Batson v Kentucky,* 476 US at 89, n 12, *supra*), although in his dissent, Justice Burger concluded that the same restrictions on defense peremptories would "inevitably" follow (*id.* at 125-126) and Justice Marshall, concurring in the majority opinion, noted that the "potential for racial prejudice * * * inheres in the defendant's challenge as well" and recommended eliminating peremptories entirely (*id.* at 108). Moreover, while holding that the Equal Protection Clause prohibits a prosecutor's exercise of peremptory challenges to exclude from the petit jury a member of the defendant's race, the Court recognized that it was both the defendant and the excluded juror who were denied

equal protection *(Batson v Kentucky,* 476 US at 87-88, *supra; see also Strauder v West Virginia,* 100 US at 308, *supra*). In addition, the Court's decision to prohibit racial discrimination in the exercise of prosecution peremptories was also premised upon the injury to the criminal justice system inherent in such discrimination:

> The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. Discrimination within the judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others" *(Batson v Kentucky,* 476 US at 87-88, *supra* [citations omitted]).

By their application to restrict defense peremptory challenges, the People have asserted the rights both of the excluded jurors and the community-at-large.[3]

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3. We also reject defendants' contention that *Batson* is inapplicable to the defense because the District Attorney is not a member of a cognizable racial group and therefore does not have standing to assert the equal protection rights of the excluded jurors *(see Batson v Kentucky,* 476 US at 96, *supra; Castineda v Partida,* 430 US 482). Although a plurality of the Supreme Court has recently declined to pass on the issue *(Holland v Illinois,* 58 USLW 4162, *supra*), five Justices agreed that notwithstanding the "cognizable racial group" requirement articulated in *Batson,* a

[footnote continued on next page]

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Defendants argue that *Batson* does not restrict their exercise of peremptory challenges because such conduct is not State action and therefore is not subject to the mandates of the Equal Protection Clause. The People respond that the defense exercise of racially discriminatory peremptory challenges is sufficiently imbued with the authority of the State to consti- tute "State action" for the purposes of equal protection.

While it is settled that the Equal Protection Clause of the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful" *(Shelley v. Kraemer,* 334 US 1, 13; *Civil Rights Cases,* 109 US 3), there is no precise formula to determine State responsibility under the clause. It is "[o]nly by sifting facts and weighing circumstances [that] the nonobvious involvement of the State in private conduct [can] be attributed its true significance" *(Burton v Wilmington Parking Authority,* 365 US 715, 722). More

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criminal defendant's race is "irrelevant to the Fourteenth Amendment standing inquiry", concluding that a white defendant would have standing to challenge the exclusion of blacks from his petit jury (*id.* at 4167 [Marshall, J. dissenting]; *id.* at 4166 [Kennedy, J., concurring]; *id.* at 4172 [Stevens, J., dissenting]). We agree with the Appellate Division that as a representative of the community, the District Attorney has a direct interest in protecting its citizens and therefore a substantial relationship with the excluded jurors (149 AD2d at 233). Moreover, as the jurors are not parties to the litigation and are unlikely to be able to assert their own rights, the State should be able to vindicate their rights (*id.; see Holland v Illinois,* 58 USLW at 4166-4167, [Kennedy, J., concurring]). For these reasons, we conclude that the District Attorney has standing to assert the rights of these jurors under both the equal protection clause and the civil rights clause of our State Constitution.

recently, the Court explained that the requisite State action is present when "the conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the State" *(Lugar v Edmonson Oil Co* (457 US 922, 939).

Defendants, relying on *Polk County v Dodson* (454 US 312), argue that the defense exercise of peremptory challenges is not state action because the decision to discriminate is purely private, and therefore not attributable to the State. In *Polk*, the Court held that a public defender's withdrawal of an appeal was not action "under color of state law" for the purposes of 42 USC § 1983, reasoning that although the public defender was a State employee, he performed an essentially private function (454 US at 318-319, *supra*). Contrary to defendants' contention, we do not read *Polk* as establishing that every action performed by a defense attorney may never be attributable to the State. The argument before the Court in *Polk* was that the actions of the public defender were necessarily attributable to the State by virtue of the attorney's relationship to the State and not because of any action taken by the State. Indeed, the Court later likened the claim in *Polk* to an argument that the State was responsible for the private decisions of a nursing home because the State extensively regulated the nursing home industry *(Blum v Yaretsky,* 457 US 991, 1008-1009). It is in that circumstance, where there is no other action by the State affecting the discriminatory act, that the relevant inquiry is whether the decision to discriminate can be attributed to the State (id. at 1004; *Jackson v Metropolitan Edison Co,* 419 US 345, 357; *Moose Lodge*

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No 107 v Irvis, 407 US 163; *Flagg Bros, Inc v Brooks,* 436 US 149, 166; *see also Under 21 Catholic Home Bureau for Dependent Children,* 65 NY2d 344).

To be distinguished are circumstances such as that presented here -- where the claimed State action arises from the State enforcement of and involvement in the discriminatory act. Thus in *Shelley v Kraemer* (334 US 1), the Court held that judicial enforcement of racially restrictive covenants constituted State action, notwithstanding that the decision to discriminate could not be ascribed to the State. Rather, State action existed because "the States have made available to [persons choosing to discriminate] the full coercive power of government to deny [black citizens] the enjoyment of property rights" (*id.* at 19; *see also Matter of Wilson,* 59 NY2d 461, 478). Similarly, in *Lugar v Edmonson Oil Co* (457 US 922), the Court found State action where a private party made use of *ex parte* State attachment procedures to deprive another person of his property. The Court explained that the State had created the attachment right and that the private party's joint participation with State officials in the seizure of the property was sufficient to render that person a "State actor", even though the decision to seize the property was purely private (*id.* at 941; *compare Adickes v S.H. Kress & Co,* 398 US 144; *see also Tulsa Professional Collection Services, Inc v Pope,* ___ US ___, 56 USLW 4302, 4304). The question is whether the degree of involvement by the State can be said to be substantial such that the coercive power of the State has been enlisted to enforce private discrimination *(Tulsa Professional Collection Services, Inc v Pope, supra*; *Shelley*

v Kraemer, supra; Matter of Wilson, 59 NY2d at 479, *supra*).

Turning then to the case before us, there can be no question that the State is inevitably and inextricably involved in the process of excluding jurors as a result of a defendant's peremptory challenges. A defendant's right to exercise the challenges is conferred by State statute (CPL 270.25). The jurors are summoned for jury service by the State (*see* Judiciary Law § 516), sit in a public courtroom and are subject to voir dire at the direction of the State, and, although defense counsel exercises the peremptory challenge and advises the judge of the decision, it is the judge, with the full coercive authority of the State, who enforces the discriminatory decision by ordering the excused juror to leave the courtroom escorted by uniformed court officers or Deputy Sheriffs. The jurors do not know whether it is the judge, the prosecutor or the defense attorney who has excused them, and the inference is inescapable to both the excluded jurors and the public that it is the State that has ordered the jurors to leave. When these jurors are so excluded solely because of their race, the State cannot ignore its role in the discrimination against them. We fully agree with the sentiments expressed by a panel of the Fifth Circuit in a different context but apt language:

> Justice would indeed be blind if it failed to recognize that the [trial] court is employed as a vehicle for racial discrimination when peremptory challenges are used to exclude jurors because of their race. The government is inevitably and inextricably involved as an actor in the process by

> which a [trial] judge, robed in black, seated in a paneled courtroom, in front of an American flag, says to a juror, "Ms. X, you are excused". A litigant's decision to provoke the court's action by virtue of a statutorily accorded right does not disguise the official governmental character of the procedure as a whole. *(Edmonson v Leesville Concrete Co, Inc,* 860 F2d 1308, 1313, *on reh'g,* 895 F2d 218).

Thus we agree with the courts below that the judicial enforcement of racially discriminatory peremptory challenges exercised by defense counsel constitutes "State action" for the purposes of our State equal protection provision and therefore that *Batson* applies to the defense *(see People v Gary M.,* 138 Misc2d 1081; *People v Muriale,* 138 Misc2d 1056; *People v Davis,* 142 Misc2d 881; *People v Piermont,* 143 Misc2d 839; *see also, Chew v State,* 71 Md App 681, 527 A2d 332; *State v Alvarado,* 221 NJ Super 324, 534 A2d 440; *Maloney v Washington,* 690 F Supp 687; Note, *Discrimination by the Defense: Peremptory Challenges After Batson v Kentucky,* 88 Col L Rev 355 [1988]; *cf., Fludd v Dyke,* 863 F2d 822 [11th Cir] [holding *Batson* applicable to civil trials] *Esposito v Buonome,* 642 F Supp 760 [same]; *Thomas v Diversified Contractors, Inc,* 551 So2d 343 [same]; *Chavous v Brown,* 385 SE2d 206 [same]; *but see Edmonson v Leesville Concrete Co, Inc,* 895 F2d 218 [5th Cir] [en banc] *[Batson* inapplicable to civil trials]).

Accordingly, we conclude that upon the People's demonstration of a *prima facie* case of discrimination,

Supreme Court properly required defense counsel to provide non-pretextual, racially neutral explanations for their challenges to black jurors. Thus, when defense counsel failed to explain their peremptory challenge to one juror, she was properly seated over their objection.

III

We also reject defendants' contentions that the evidence adduced at trial was legally insufficient to support their convictions of second degree manslaughter (Penal Law § 125.15[1]) and first degree assault (Penal Law § 120.10[1]).

Viewed in the light most favorable to the People *(People v Contes,* 60 NY2d 620, 621), the evidence supports the jury's finding that defendants recklessly caused Griffith's death (Penal Law Sec. 125.12[1]) because they were aware of the risk of death to Griffith as they continued to chase him on 90th Street and onto a six-lane highway, they consciously disregarded that risk, and, in so doing, grossly deviated from the standard of care which reasonable persons would have observed under the circumstances (*see* Penal Law § 15.05[3]). The evidence was also sufficient to support findings that defendants' actions were a "sufficiently direct cause" of Griffith's death *(People v Kibbe,* 35 NY2d 407, 413) and that although it was possible for Griffith to escape his attackers by turning onto Shore Road rather than attempting to cross the Belt Parkway, it was foreseeable and indeed probable that Griffith would choose the escape route most likely to dissuade his attackers from pursuit. The evidence was sufficient to prove, beyond a reasonable doubt, that Blum's operation of his

automobile on the Belt Parkway was not an intervening cause sufficient to relieve defendants of criminal liability for the directly foreseeable consequences of their actions (*id.* at 413).

The evidence is also legally sufficient to support defendants' conviction of first degree assault (Penal Law § 120.10[1]). Contrary to defendants' contention, when viewed in the light most favorable to the People *(People v Contes,* 60 NY2d at 621, *supra*), the evidence supports the jury's determination that Sandiford suffered "serious physical injury" as a result of their attack upon him. Their determination that Sandiford suffered a "protracted impairment of [his] health" (Penal Law § 10.00[10]) was supported by the testimony of Sandiford and the doctors who treated him that Sandiford suffered severe injuries to his back and right eye which affected him for nearly a year after the incident.

Defendants also assign error to several of Supreme Court's suppression and trial rulings. We note that any error in the admission of Lester's statement to Assistant District Attorney Wolk *(see People v Cunningham,* 49 NY2d 203), is harmless beyond a reasonable doubt. The content of the statement, in which Lester admitted hitting Sandiford in the head with a bat, was also established by Sandiford's own testimony, as corroborated by the testimony of Robert Riley and three non-accomplice eye-witnesses. Thus, in light of the overwhelming evidence of defendants' guilt, there is no reasonable possibility that the statement contributed to the verdict *(People v Crimmins,* 36 NY2d 230, 237). We have reviewed those of defendants' remaining con-

tentions which have been preserved for our review, and conclude that they do not warrant reversal.

Accordingly, the order of the Appellate Division should be affirmed.

Order affirmed. Opinion by Judge Alexander.
Chief Judge Wachtler and Judges Simons, Kaye, Titone, Hancock and Bellacosa concur.

Decided March 29, 1990

Appendix B
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COURT OF APPEALS
STATE OF NEW YORK

The Hon. Sol Wachtler, Chief Judge, Presiding

No. 43

THE PEOPLE & C.,

Respondent,

v.

SCOTT KERN, JASON LADONE and
JON LESTER,

Appellants.

The appellant(s) in the above entitled appeal appeared by Hoffman & Pollok, Esqs.; the respondent(s) appeared by Helman R. Brook, Esq., Special State Prosecutor; and amici curiae appeared by Philip L. Weinstein, Esq., Legal Aid Society and Fischetti Pomerantz & Russo.

The Court, after due deliberation, orders and adjudges that the order is affirmed. Opinion by Judge Alexander. Chief Judge Wachtler and Judges Simons, Kaye, Titone, Hancock and Bellacosa concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Queens County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of

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Appeals and that the papers required to be filed are attached.

/s/ _____
Donald M. Sheraw,
Clerk of the Court

Court of Appeals,
Clerk's Office,
Albany, March 29, 1990

No. 89-2032

IN THE

Supreme Court of the United States

October Term, 1989

SCOTT KERN, JON LESTER, and JASON LADONE,

Petitioners,

against

THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

HELMAN R. BROOK
Deputy Attorney General
Special State Prosecutor

HILLEL J. HOFFMAN
Special Assistant Attorney General
Counsel of Record

MATTHEW S. GREENBERG
Special Assistant Attorney General
Attorneys for Respondent

2 Rector Street
New York, New York 10006
(212) 406-9610

QUESTION PRESENTED

Whether the decision of the New York Court of Appeals which found purposeful racial discrimination in the exercise of peremptory challenges by the defense was based strictly and solely on New York law?

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Cases:

In The

SUPREME COURT OF THE UNITED STATES

October, 1989

Scott Kern, Jon Lester, and Jason Ladone,
Petitioners,

-against-

The People of The State of New York,
Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Respondent opposes the Petition for a Writ of Certiorari to review the judgment of the Court of Appeals of the State of New York.

OPINION BELOW

The opinion of the Court of Appeals is reported at 75 N.Y.2d 638, 555 N.Y.S.2d 647 (1990).

JURISDICTION

The judgment of the Court of Appeals was entered on March 29, 1990. The decision of the Court of Appeals was based solely and strictly on its interpretation of the New York State Constitution, Article I, Sections 1 and 11, and the New York Civil Rights Law, Section 13. Therefore, the jurisdiction claimed by the petitioners has been improperly invoked.

STATE CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of Article I of the State Constitution in pertinent part provides:

> No member of this state shall be *** deprived of any of the rights or privileges secured to any citizen thereof ***

Section 11 of Article I of the State Constitution provides:

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed, or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

STATE STATUTE INVOLVED

Civil Rights Law, Section 13, in pertinent part provides:

> No citizen of the state possessing all other qualifications which are or may be required or prescribed by law, shall be disqualified to serve as a *** petit juror in any court of this state on account of race.

STATEMENT OF THE CASE

After a jury trial in the Supreme Court of the State of New York, in the County of Queens, petitioners Scott Kern, Jon Lester, and Jason Ladone were convicted of manslaughter in the second degree (Penal Law §125.15) and assault in the first degree

(Penal Law §120.20). Petitioners Lester and Kern were also convicted of conspiracy in the fifth degree (Penal Law §105.05).

Petitioner Lester was sentenced to terms of imprisonment totalling 10 to 30 years. Petitioner Kern was sentenced to terms of imprisonment totalling 6 to 18 years. Petitioner Ladone was sentenced to terms of imprisonment totalling 5 to 15 years.

The judgment of the Supreme Court, Queens County was affirmed by the Appellate Division, Second Department (149 A.D.2d 187, 545 N.Y.S.2d 4 (1989)) and the Court of Appeals (75 N.Y.2d 638, 555 N.Y.S.2d 647 (1990)).

1. On December 19, 1986, three black men, Timothy Grimes, Cedric Sandiford and Michael Griffith were walking on Crossbay Boulevard in the Howard Beach section of Queens, New York toward a subway station. (Tr. 1239-44, 1583-84, 4701.) As they crossed an intersection near a pizzeria, they encountered three white teenagers in a car[1] who stuck their heads out of a window and yelled, "Nigger, get the fuck off [sic] the neighborhood." Sandiford answered, "Fuck you, honkie." (Tr. 1093, 1095-80A, 1084A-86A, 4703, 4706.) The black men went into the pizzeria.

At the same time, a group of teenagers was attending a birthday party in Howard Beach. Petitioner Lester, following his encounter with the black men on Crossbay Boulevard, returned to this party. He stood at the entranceway to the party and shouted, "There are some niggers on the boulevard. Let's go up there and kill them." (Tr. 2237-2238, 5718.) Three car-loads of teenagers left the party to drive to the vicinity of the pizzeria. A group of teenagers, including the petitioners, confronted the black men as they left the pizzeria. (Tr. 2241-48.)

Sandiford counted ten to twelve white teenagers facing him outside the pizzeria "with bats and sticks in their hands" and shouting, "Niggers, get the fuck out of the neighborhood."

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[1] Petitioner Lester was one of the teenagers in the car. (Tr. 1091.)

Petitioner Kern punctuated his taunt by banging a baseball bat on the ground.[2] The white teenagers formed a semi-circle around the three black men. Grimes saw "about ten" of them coming at him, one with the bat and others with sticks and "something like an iron pipe," and heard the one pounding the bat exhort the rest to "Hit the nigger!" Grimes pulled out a knife[3], held it up in front of him, and ran around the group. (Tr. 1247-52, 2249-50, 4709.)

Sandiford was struck in the back with a bat. He felt a lashing pain. He was hit "about three more times" by the bat and tree limbs wielded by his assailants who continued to shout, "Niggers, get the fuck out of the neighborhood." (Tr. 4709, 4714.)

Sandiford broke away and fled several blocks. Griffith, who was also running ahead of others in the mob, veered off onto a side street. Grimes fled north along Crossbay Boulevard and, although struck in the back by thrown sticks, managed to outrun his pursuers. (Tr. 1253-56, 4710, 4712-14.)

As Griffith turned right onto a side street, he was chased by three teenagers in a car and the petitioners with Michael Pirone[4] on foot. Directly ahead of Griffith was a barrier separating the dead end of the street from the Belt Parkway, a limited access six lane highway. (Tr. 2257-66, 2297.)

The car stopped and petitioner Lester grabbed the bat from it. The petitioners and Michael Pirone pursued Griffith to the barrier. Two of the teenagers from the car joined the chase. Griffith had by then climbed over the guard rail and had started

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[2] Petitioners attribute the taunt solely to Robert Riley, an accomplice. Compare their petition at 4 *with* the record at 2249.

[3] Riley testified that he saw two men with knives. (Tr. 2252.)

[4] Michael Pirone was acquitted of all charges.

to run "straight onto the Belt Parkway." (Tr. 2267, 2285-87, 2297-99.)

Griffith ran across the eastbound Belt Parkway and vaulted the median where he was struck by a westbound automobile and killed. (Tr. 2298-2300, 3899-3900.)

Petitioner Lester, still with the bat, and the other petitioners turned around, ran back down the side street and onto a nearby avenue to find Sandiford. Petitioners and others caught Sandiford from behind and hit him with tree limbs and the bat. Sandiford grabbed at the bat and struggled for it with petitioner Lester pleading, "Please, oh God. Don't kill me! I have a son old like you." Petitioner Lester won the struggle for the bat and swung it at Sandiford's head, opening a wound which sent blood streaming down the back of Sandiford's neck.[5] (Tr. 4715-20.)

A witness, Theresa Fisher, saw approximately twelve white male teenagers beating Sandiford with a crowbar and a tree stump. Then she saw "one of the boys sw[i]ng a baseball bat at him" as Sandiford vainly cried, "They're going to kill me. Please help me!" She saw Sandiford fall to the ground and the young men kick him and continue hitting him with the objects until he was able to get up and run away. (Tr. 342-44, 346-68, 372-73.)

Sandiford ran across the street, but the gang caught up again and resumed beating him "with bat and tree limbs, and I don't know what else," all about his body. He continued to plead, "Please, oh God, help me!" He was knocked off his feet and hit in the eye with a tree limb. He lay on the ground covering his face until the beating stopped. His assailants got into cars and drove off. (Tr. 4719-21.)

Sandiford sustained lacerations and contusions on the back of his head, multiple abrasions, and a swollen right eye. (Tr. 5480-83, 5487-91.)

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[5] Sandiford testified that he "fel[t] like [his] brain *** busted apart." (Tr. 4718.)

2. The trial of the petitioners was conducted in an orderly courtroom in a professional manner.

Petitioners' statement that the prosecution "attempted to exclude white and Italian-American jurors" (Petition at 5) is false. No court has ever found that the prosecution attempted to exclude any juror of a particular race or ethnicity from the jury. Nor have petitioners ever demonstrated to any court that the prosecution attempted to seat as many "African-American jurors as possible in the belief that such jurors would be more inclined to convict the defendants." (Petition at 5) The record reflects that of the first six seated jurors who were acceptable to the prosecution, four were white. (Nina Krause, Michael Sweeney, James Spongross and Maxine Reynolds). Of the next six seated jurors who were acceptable to the prosection, two were white (Margaret Van Wort and Lois Pena). The remaining jurors consisted of two Hispanics, two Asians, one Bengali and one African-American woman, who was seated over petitioners' objections.

The trial court concluded that it was the petitioners who used their peremptory challenges to systematically exclude African-Americans from the jury.[6]

REASONS FOR DENYING THE PETITION

1. This Court should deny the petition because the decision of the New York Court of Appeals is based solely and strictly on New York law. When a state court decision indicates clearly and expressly that it is based on adequate and independent state grounds, this Court should not undertake to review its decision. *Michigan* v. *Long*, 463 U.S. 1032, 1041-1042, 103 S.Ct. 3469, 3476-3477 (1983).

It is essential that state judges be afforded an opportunity to develop state jurisprudence "unimpeded by federal interference."

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[6] For a detailed and explicit discussion of the jury selection please see the opinion of the Court of Appeals, page 8a of the petition.

Id. quoting Minnesota v. *National Tea Co.*, 309 U.S. 551, 557, 60 S.Ct. 676, 679 (1940).

The decision of the New York Court of Appeals in this case rests on adequate and independent state grounds, namely, a provision of the New York State Constitution (Article I, Section 11) and a state statutory section (New York Civil Rights Law, Section 13). [See Petitioners' Appendix at pp. 13a-25a.] The decision states that the New York State Constitution does not permit the "purposeful racial discrimination practiced by the defense here". [Petitioners' Appendix at p. 13a.] It specifies that jury service is a civil right established by both the New York State Constitution (Article I, Section 1) and state statute (Civil Rights Law §13). [Petitioners' Appendix at p. 15a and p. 17a.]

It also states that the judicial enforcement of racially discriminatory challenges exercised by defense counsel constitutes "State action" for the purposes of the equal protection clause in the New York State Constitution (Article I, Section 11). In doing so, the decision relies on four New York State cases. [Petitioners' Appendix at p. 24a.]

This case is readily distinguishable from *New York* v. *P.J. Video, Inc.*, 475 U.S. 868, 872-873, 106 S.Ct. 1610, 1613-1614 (1986). In that case, the New York Court of Appeals, while professing to base its decision on the New York State Constitution and various state-court decisions, cited the New York Constitution only once, near the beginning of its opinion, and in the same parenthetical cited the Fourth Amendment of the United States Constitution. In addition, the Court of Appeals repeatedly referred to the "First Amendment" and "Fourth Amendment" causing this Court to believe its decision was based on federal law. The only citations appended to the crucial language quoted in the text were to federal decisions. Therefore, this Court, in concluding that it had jurisdiction, determined that the true basis of the New York Court of Appeals decision was not state but federal law.

The decision of the state court in this case contains the requisite "plain statements" that it rests on state grounds. 463

U.S. at 1042, 103 S.Ct. at 3478. The New York Court of Appeals begins the second section[7] of its decision regarding discriminatory peremptory challenges by the defense by stating, "For the reasons that follow, we agree with the courts below that such purposeful racial discrimination [of jurors] is prohibited by both the civil rights clause and the equal protection clause of Article I Section 11 of our State Constitution." [Petitioners' Appendix at p. 12a.] At the conclusion of the second section of its discussion of discriminatory peremptory challenges by the defense, the New York Court of Appeals states, "Accordingly, we conclude that purposeful racial discrimination in the exercise of peremptory challenges, whether exercised by the prosecution or the defense, is prohibited by the civil rights clause of Article I Section 11 of the State Constitution." [Petitioners' Appendix at p. 17a.] At the conclusion of its third section of its opinion concerning discriminatory peremptory challenges by the defense, the New York Court of Appeals states, "Thus we agree with the courts below that the judicial enforcement of racially discriminatory peremptory challenges exercised by defense counsel constitutes 'State action' for the purpose of our State equal protection provision and therefore that *Batson* applies to the defense (cites omitted)." [Petitioners' Appendix at p. 24a.] These are "plain statements" reflecting the analysis of the New York Court of Appeals of the New York State Constitution.

2. This Court should deny the petition because nothing in the decision of the New York Court of Appeals concerning peremptory challenges violates any federal constitutional guarantee afforded the petitioners.

Although peremptory challenges may be important in criminal trials, they are not of constitutional dimension. "There is nothing in the Constitution of the United States which required the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured." *Stilson* v.

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[7] In the first section of its decision regarding discriminatory challenges by the defense, the Court of Appeals dismissed the argument by the respondent that the issue was moot.

United States, 250 U.S. 583, 586, 40 S.Ct. 28, 30 (1919). *See also Holland* v. *Illinois*, ___ U.S. ___, 110 S.Ct. 803 (1990).

The Court of Appeals, in applying the State's civil rights and equal protection laws, did not violate any federal constitutional protection afforded the defense. Instead, it applied the same standards to the defense and the prosecution during jury selection in New York State criminal trials. Treating the defense and the prosecution identically during jury selection does not cause unbalanced juries; it produces fair and impartial ones.

CONCLUSION

Based upon the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

HELMAN R. BROOK
Deputy Attorney General
HILLEL J. HOFFMAN*
Special Assistant Attorney General
MATTHEW S. GREENBERG
Special Assistant Attorney General
Attorneys for Respondent

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*Counsel of Record.